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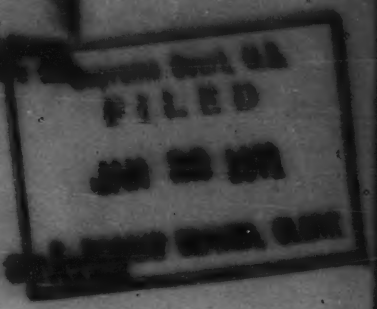

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1970
No. 1264

HAROLD DAVID GIBBS, Petitioner
v.
UNITED STATES OF AMERICA, Appellee

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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OPINION BELOW

Petitioner, Harold David Gibbs, Jr., hereby applies for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review the judgment rendered by said court in the above entitled cause. The opinion of the Court of Appeals herein is appended hereto and designated as Appendix "A" to this petition.

JURISDICTION

The judgment of the Court of Appeals in the instant matter was entered November 19, 1970. A petition for rehearing was thereafter filed by petitioner, and the same was denied by the order of the Court of Appeals filed December 23, 1970. A copy of said order is appended hereto and designated as Appendix "B" to this petition. The jurisdiction of this Honorable Court is invoked pursuant to the provisions of Title 28, United States Code, §1254(1).

REASON FOR HEARING

A hearing is requested in the instant matter to render the judgment herein consonant with this Court's determination in Leary v. United States, 395 U.S. 6, 89 S. Ct. 1532, 23 L.Ed.2d 57 (1969), respecting the evidentiary requisites in a prosecution for violation of 21 U.S.C. 176a. In the case at bar, it is submitted, the very presumption ruled unconstitutional in Leary was tacitly employed in lieu of substantive evidence of record to prove two essential elements of the prosecution: that the marijuana subject of the charges

in the case was imported and that the importation was unlawful. Such result cannot be sanctioned without negativing the purport of the Leary decision and depriving it of the clear and unequivocal authoritative effect which is essential to a determination of this Court. A hearing herein is thus needed to reaffirm and apply the holding of Leary to the case at bar and to reverse the judgment below which is in conflict therewith.

STATEMENT OF CASE

The present case concerns a prosecution for knowingly receiving, concealing and facilitating the transportation and concealment of marijuana in violation of 21 U.S.C. 176a and for conspiracy to violate said section. Petitioner was tried jointly with Jose Felipe Fernandez-Ortiz, also known as Joe Fernandez, and Elvira Galvan Rodriguez before a jury on the said charges. A judgment of acquittal as to Rodriguez was ordered entered by the trial court, and the jury returned verdicts of guilty against petitioner and Fernandez-Ortiz on both counts of the

indictment. Petitioner was sentenced to a term of imprisonment for five years concurrently as to each count and has remained at liberty on appeal bond pending determination of his appeal.

STATEMENT OF FACTS

Two evidentiary hearings were had in the case at bar. The first, transpiring October 8, 1969, pertained to a motion to suppress evidence made by the parties and was heard before the trial court alone in the absence of the jury. The second evidentiary proceeding was the trial of the cause before the jury on October 14, 1969 in which the substantive evidence in support of the verdicts thereafter returned was adduced. The basis for the within petition contests the sufficiency of the substantive record to prove the essential allegations of the charged offenses, and accordingly only the evidence presented to and heard by the jury will be detailed below. All page references are thus to the reporter's transcript of the trial proceedings of October 14, 1969.

The trial evidence in the instant matter consisted of the testimony of four United States Customs Agents plus an initial stipulation that the material recovered from the Buick automobile driven by petitioner at the time of his arrest was analyzed and found to consist of seventy-five packages of marijuana weighing approximately one hundred five pounds (R.T. pp. 22-24).

Rex Holgerson was called first as a witness. He identified himself as a United States Customs Agent and testified that shortly after 8:00 p.m. April 29, 1969, he went to the Safeway parking lot in Nogales, Arizona located about a half block from the border crossing point between the United States and Mexico. In the lot, in a darkened area, he observed two vehicles parked near each other, a green Buick sedan with Sonora, Mexico license SJ 4895 and a white Ford pick-up with Sonora, Mexico license SH 8931. He walked close to the vehicles and noticed a strong marijuana odor in the area. He then left the location and took a vantage

point to continue observation. About 8:30 p.m. he saw petitioner, Fernandez-Ortiz, and Rodriguez walk onto the lot and approach the rear of the two vehicles, petitioner walk around and to the side of the Buick, and then the three of them leave the lot together. As they left the area petitioner carried a small object in his hand but appeared to be carrying nothing before approaching the vehicles (R.T. pp. 24-29).

Holgerson followed the three individuals and observed them sitting for a time on the steps of a building about a block from the Safeway store, and then saw them go to the bus station across the street from the port of entry. Holgerson then contacted other agents at the port of entry and directed them to maintain surveillance on the parties. He returned to the Safeway parking lot and met agent Cavitt there. Shortly afterward he saw petitioner and Fernandez-Ortiz walk onto the parking lot, remain a brief time, and then leave. Following this he crawled under the Buick and observed a special

metal compartment attached to the undercarriage of the vehicle. Through cracks in the compartment he saw numerous green paper wrapped packages and also detected a strong odor of marijuana. He received a signal from Cavitt at this time, removed himself from beneath the Buick, and secured a hiding place. He then saw Fernandez-Ortiz walk to the Ford pick-up, enter it, and drive from the lot across the border into Mexico and out of view (R.T. pp. 29-31).

Approximately 9:45 p.m. Holgerson again saw petitioner and Fernandez-Ortiz enter the parking lot. Petitioner went to the Buick, got into it and started the engine, and then turned the car around. He then got out of the vehicle and proceeded to remove the license plates on the car and to replace them with others. Fernandez-Ortiz then walked to the Buick, appeared to talk briefly with petitioner, and walked away. Petitioner re-entered the car and drove it from the location. Holgerson followed him, was joined by agent Klink, and the two of them stopped and

arrested petitioner. The Buick was searched and the packages recovered and removed from the under compartment. These items were then booked as evidence and received in the trial of the case (R.T. pp. 32-38).

Roland Klink then testified that he was a Customs Agent for the Treasury Department and that about 8:20 p.m., April 29, 1969, he received a request for assistance from Agent Holgerson. Following this he commenced surveillance of petitioner and Fernandez-Ortiz, observing them initially in front of the bus station. He saw them talking together, enter and leave the bus depot several times, and then walk towards the Safeway shopping area out of his view. Petitioner returned to his view shortly afterward and was observed by Klink to walk about in the area near the bus station, looking about from time to time, stand for a while in front of a closed cleaning store, then enter a drug store but not appear to make a purchase, and then walk back to the bus station. About 10:00 p.m., from another

vantage point, Klink saw Holgerson in his car in pursuit of a green Buick. He immediately followed in his own car and assisted in the stopping and arrest of petitioner, who was driving the Buick, and in the search of that vehicle and recovery of the evidence (R.T. pp. 50-56).

John Dennis then testified that he was also a special Customs Agent and that in the company of Agent Cavitt he placed Fernandez-Ortiz and Rodriguez under arrest as they were entering a taxi cab near the bus station in Nogales. Prior to that he had participated in the surveillance of the parties. Just before the arrest he observed Fernandez-Ortiz come from the Safeway parking lot and Rodriguez from the bus station. He received a radio call from Agent Holgerson at that time (about 10:00 p.m.) and then made the arrests (R.T. pp. 65-72).

Horace Cavitt then testified that he was a Customs Agent stationed at Nogales, Arizona. He received a call for assistance from Agent Holgerson following which he

proceeded to the Safeway parking lot where he examined a green Buick and white Ford pick-up, both with Sonora, Mexico license plates, which were parked there. He noticed nothing unusual about the Ford but observed a special compartment containing wrapped brick shaped packages under the Buick and a strong odor of marijuana from the location. He then communicated this information to Holgerson and observed him look under the Buick. Subsequently he observed the Buick being driven from the area. He then joined Agent Dennis, and after receipt of a call from Holgerson assisted Dennis in the arrest of Fernandez-Ortiz and Rodriguez. Later he again observed the Buick and at that time it had California license plates on it (R.T. pp. 73-78).

The foregoing concluded the substantive evidence of record presented to the jury and thus formed the basis for the verdicts returned against petitioner.

PETITIONER'S POSITION

Petitioner contends that the evidence received in the trial of the instant case is insufficient as a matter of law, under the holding of this Court in Leary v. United States, supra, to establish two requisite elements of the charges against him, to wit: that the marijuana found in his possession was of foreign origin and that such marijuana was unlawfully imported. Petitioner submits that such elements must be established by competent evidence and not assumption, and that the lack of evidence in this respect reflects a deficiency in the trial record which warrants, consistent with the Leary decision, a reversal of the consequent judgment of conviction herein.

DISCUSSION OF CASE

A discussion of the present matter requires an initial analysis of the decision in Leary v. United States, supra, which concerned the requisites of proof in prosecutions under 21 U.S.C. 176a. It is, of course, clear that in such

prosecutions, as in the instant case, the charges concern acts purportedly committed respecting marijuana which has been unlawfully imported into the United States. Prior to the Leary case, the elements of unlawful importation were provable by application of a presumption contained in the charging code section based on the established fact of the defendant's possession of the marijuana subject of the case.

Leary, however, ruled this presumption to be unconstitutional and held that proof was required of each element of the accusation under §176a, including the unlawfully imported character of the marijuana in question. This, therefore, meant that the Government, to sustain its prosecution under §176a, had to present evidence respecting both the foreign origin of the subject marijuana and its unlawful importation. The present record, however, is devoid of any substantial evidence respecting either of these issues.

The two facets of the charge under 21 U.S.C. 176a, foreign origin and unlawful importation, although related, are essentially distinct and severable and thus must be regarded separately. The first circumstance concerns the derivation of the marijuana involved in the case; the second, the nature of its importation, whether lawful or contrary to law, if not of domestic character. Respecting the first matter, the origin of the subject marijuana, the substantive evidence in the case at bar is exceedingly limited.

Thus the sole evidence on this issue appears to be the proximity of the marijuana when first detected in the Safeway store parking lot to the international border and its concealment in a car of American manufacture containing Mexican license plates which were later replaced with California plates. No testimony, it appears, was offered in the case directly pertaining to the source of the marijuana or its transfer across the border; nor was any evidence adduced concerning the

character of the substance or its packaging which would have tended to establish a foreign origin. Moreover, there was no expert testimony presented relative to any distinctive characteristics between domestic and foreign marijuana from which the jury in the instant case could have assessed the exhibit before it with respect to its origin or source.

It appears that even the Court of Appeals in its decision below, in commenting on what it considered the circumstantial evidence in the record from which the jury could have found unlawful marijuana importation, could not avoid going beyond the record to base such support. Thus, the Court of Appeals commenced its itemization of the supportive evidence with reference to testimony of Agent Holgerson (that he believed his informer's telephone call originated in Mexico), which testimony was not presented to the jury at all but which was given solely in the pre-trial hearing on the motion to suppress evidence. Further, the Court of Appeals incorrectly stated

in its opinion on this point that the jury was given evidence that Fernandez-Ortiz drove the pick-up truck, that was parked next to the Buick automobile ultimately discovered to contain the subject marijuana received in the case, back into Mexico, whereas there was actually no evidence presented as to the truck having recently been in Mexico, except as may have been inferable from the call of Holgerson's informant which, as noted, was not evidence presented to the jury.

In effect, then, the Court of Appeals could not limit its references to evidence supportive of the jury's verdict herein to the substantive record of the case but relied on evidentiary support which was not presented to or considered by the jury. Additionally, it appears the Court of Appeals misinterpreted certain other facts testified to before the jury in this connection which requires comment. Thus, in its opinion the statement is made that petitioner commenced to drive the marijuana-laden vehicle northward as evidence that the marijuana contained in

the vehicle originated in Mexico. However, the actual testimony on this point by Holgerson was that the vehicle was driven by petitioner from the Safeway store parking lot to Crawford Street, then "east one block on Crawford, north again on Terrace Street and east on Elm and north on Arroyo Boulevard" where it was stopped after about two blocks (R.T. pp. 32-33). Such a route, it is submitted, is not evidence that the marijuana in the automobile so driven was of foreign origin and reliance on it reflects the very tenuous basis of the evidence of record in this regard.

Reduced to its essence, the substantive evidence concerning the source of the marijuana in the instant case was its initial location near the border in a car which for a time had Mexican license plates. This, it is submitted, is not evidence of origin of the marijuana but the basis only of surmise. To sustain a finding of imported character based thereon would be to substitute for the presumption invalidated by this Court in Leary another equally untenable presumption

predicated on proof of marijuana possession close to an international border. It is not, however, the particular location in the United States of the product when discovered which determines its source but evidence which relates to and thus establishes its non-domestic nature. Absent evidence of circumstances directly placing the subject marijuana outside the United States or being transferred across the border into the country, such evidence must be of a character which delineates origin by the quality of the material in question or by the manner of its packaging or by other certain indicia of international derivation.

As observed earlier, no evidence in any such or comparable respect was introduced in the case. The proof required of the Government in this connection was not presented to the jury, and the Government may not avoid its responsibility merely by showing the possession of marijuana proximate to the border as was done in the instant case. Rather the Government must be prepared, by direct or

circumstantial evidence, through perceived circumstances or expert testimony, to prove the foreign source of marijuana subject of prosecution under 21 U.S.C. 176a. Such is the obligation imposed by Leary v. United States, supra, and its non-satisfaction in the case at bar is evident from a review of a record which even the Court of Appeals could not limit itself to in endeavoring to uphold the verdicts returned.

The second facet of the charges in the present case warranting consideration, as referred to previously, concerns the unlawfulness of such marijuana importation as may have herein occurred. Respecting this issue, an evidentiary deficit is similarly apparent in the record. Thus, it should be observed, marijuana importation into the United States is not, as is the case of narcotic drugs under 21 U.S.C. 173, per se unlawful. Rather, marijuana importation is contrary to law only where the marijuana has not been declared and where requisite registration and tax payment has been fraudulently avoided. Thus,

as succinctly stated in Ortiz v. United States, 329 F.2d 381 (5th Cir. 1964) at page 382: " . . . the importation of marijuana is illegal except after payment under 26 U.S.C.A. 4751 of the special tax there required, and after registration under the provisions of 26 U.S.C.A. 4753 . . . ." (See, too, Instructions to Jury (R.T. pp. 109-110).

In the present case, it appears, the record is devoid of any proof that the subject marijuana, if imported, was imported unlawfully. The record, in essence, is completely silent on the question of tax payment and registration or the lack thereof. No presumption in this regard is available to the Government, but rather the Government must be prepared to prove and actually must present credible evidence on the issue. The lack of such evidence in the instant case thus fails to establish this essential element of the charges against appellant and constitutes a further critical defect in the Government's case. The unlawfulness of the importation, no less so than

each other element of the charges, requires proof by the prosecution, and such proof simply was not presented in the trial of the cause.

CONCLUSION

In Leary this Court declared that proof not presumption was requisite to the sustaining of charges under 21 U.S.C. 176a. However, in the instant case the mandate of this Court was essentially ignored. To permit the judgment herein rendered to stand will serve significantly to reduce the authority of Leary because it will sanction the use of a substituted presumption in lieu of the evidentiary proof directed by the express language of the Leary case. The consequent emasculation of the legal purport and effect of a decision of this Court by the Court of Appeals must not be affirmed. Limitation of Leary, if appropriate, should only stem from further consideration and determination of the issues by this Court. The decision of the Court of Appeals below is accordingly in conflict with established precedent of this Court, and a hearing

herein is thus required to remedy such circumstance.

APPLICATION

It is respectfully requested, on the basis of the arguments presented and the authorities cited hereinabove, that the within petition for writ of certiorari be granted and the matter set for hearing on this Honorable Court's docket.

Respectfully submitted,
HOWARD E. BECKLER
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,* v. HAROLD DAVID GIBBS, JR., *Appellant.*	No. 25,271
UNITED STATES OF AMERICA, *Appellee,* v. JOSE FELIPE FERNANDEZ-ORTIZ, *Appellant.*	No. 25,286

[November 19, 1970]

Appeal from the United States District Court
for the District of Arizona

Before: MADDEN*, Judge of the United States Court of Claims, HAMLEY and TRASK, Circuit Judges.

TRASK, Circuit Judge:

Appellants were jointly tried before a jury and convicted on two counts of knowingly receiving, concealing and facilitating the transportation and concealment of marihuana in violation of 21 U.S.C. § 176a and of conspiracy to violate 21 U.S.C. § 176a. Both appellants were sentenced to five years imprisonment on each count, to be served concurrently. They have prosecuted separate appeals which we have consolidated for argument and disposition.

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*Hon. J. Warren Madden, Senior Judge, United States Court of Claims, sitting by designation.

The pertinent facts are as follows: At approximately 8:00 P.M. on April 20, 1989, Special Agent Rex Holgerson of the United States Customs Service in Nogales, Arizona, received a telephone call from a known informer whom he believed to be in Mexico. The caller, speaking Spanish, informed him that a green 1955 Buick sedan and a white Ford pickup truck, both with Mexican license plates, were then parked in a supermarket parking lot in Nogales, one-third block from the Mexican border. The Buick contained a load of marihuana and, later that evening, persons unknown to the informer would pick up the Buick and drive it north from Nogales. The informer added that the pickup was also involved in the operation.

Agent Holgerson proceeded immediately to the parking lot and discovered the two vehicles there. The details given by the caller were accurate in every respect. Holgerson detected a strong odor of marihuana emanating from the area of the vehicles. About one-half hour later, Holgerson observed three people—later identified as the two defendants and one Elvira Galvan Rodriguez[1]—approach the vehicles together. Gibbs carefully walked around the Buick while the others remained at the rear of the cars. The three then left the parking lot. Soon thereafter, Gibbs and Fernandez-Ortiz returned to the lot but again walked away.

Agent Horace Cavill, whom Holgerson had summoned, approached the Buick and, looking underneath it, discovered a specially-built iron compartment welded to the frame of the car. The compartment contained a large number of green packages. The odor of marihuana was very strong underneath the car. Agent Holgerson then peered underneath the car and confirmed the observation.

As Holgerson completed the examination, about 9:00 P.M., Fernandez-Ortiz reappeared and drove the Ford pickup out of the parking lot and into Mexico. At approximately 9:30 P.M., Gibbs and Fernandez-Ortiz entered the lot. Gibbs replaced the Mexican license plates on the Buick with California plates as Fernandez-Ortiz looked up and down the street. About fifteen minutes later,

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[1]Miss Rodriguez was indicted and tried jointly with the appellants. The trial judge granted her motion for a judgment of acquittal at the close of the prosecution's case.

Gibbs took the Buick out of the parking lot and drove it several blocks northward until he was apprehended by Holgerson. A search of the compartment underneath the car's frame revealed one-hundred five pounds of marihuana. At the same time, another agent apprehended Fernandez-Ortiz as he prepared to enter a taxicab.

Appellants argue that the agents' search of the underside of the car while it was parked in the lot violated their Fourth Amendment right to be free of unreasonable searches. They further contend that the trial court erred in refusing to order the disclosure of the identity of the informer. Appellant Gibbs also asserts that the government failed to introduce any evidence that the marihuana had been imported into the United States contrary to law. We affirm.

(1) *Validity of the search*

Appellants allege that the agents' inspection of the underside of the Buick sedan constituted an unlawful, warrantless search and the evidence obtained as a result of that search—the marihuana—was inadmissible at trial. Appellants contend that, even though the evidence was located in an area which might be termed accessible to the public, they sought to preserve it as private and it is therefore constitutionally protected. See *Katz v. United States*, 389 U.S. 347, 351 (1967).

Assuming *arguendo* that the agents' visual inspection constituted a search and that both appellants have standing to object to that search, the Fourth Amendment does not prohibit the warrantless search of a vehicle if it is made upon probable cause. *Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132 (1925). We think that the agent had probable cause to inspect the vehicle. He had received a detailed tip from a known informer to the effect that the automobile contained marihuana. The tip proved correct in every other detail. Moreover, there was a strong odor of marihuana around the automobile.

The Supreme Court has held that, assuming the existence of probable cause, vehicles may be searched under circumstances which would not justify a warrantless search of a house, office or other immovable structure. *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 221 (1968). The reason for this distinction is that vehicles can be quickly moved out of the jurisdiction in which the warrant must

be sought. *Chimel v. California*, 395 U.S. 752, 764 n.9 (1969); *Carroll, supra*, 267 U.S. at 153. Here, despite the fact that the automobile was unoccupied at the time of the search, the agents had reasonable cause to believe that it would soon be moved outside the jurisdiction. The informer—reliable in all particulars to this point—had reported at 8:00 P.M. that the automobile would be driven north that evening. Moreover, two persons—later identified as the appellants—had twice approached and carefully examined the vehicle.[3]

We hold that, under the facts of this case, the agents' visual inspection of the vehicle was not an unreasonable search.

(2) *Refusal to disclose informer's identity*

Appellants, at the hearing on their motion to suppress evidence and again at trial, requested the court to order the government to reveal the name of the informer who telephoned Agent Holgerson. Appellants now allege that the court erred in denying these requests.

There is no absolute rule entitling a defendant to disclosure of the name of an informer who has furnished information used against him. The court must weigh the interest of the defendant's right to prepare a defense against the public policy of conserving the usefulness of an informer and protecting him personally. The Supreme Court said in *Roviaro v. United States*, 353 U.S. 53, 62 (1957):

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

See also *McCray v. Illinois*, 386 U.S. 300 (1967); *Ybarra v. United States*, No. 25, 289 (9th Cir. Aug. 24, 1970).

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[3] The mobility of the object to be searched without a warrant distinguishes this case from *Wattenburg v. United States*, 388 F.2d 853 (9th Cir. 1968), cited by appellants. The likelihood that the vehicle would be quickly moved outside the jurisdiction distinguishes the case from *United States v. Payne*, 429 F.2d 169 (9th Cir. 1970).

Appellants argue, and this court has acknowledged, that disclosure is required where it would be "relevant and helpful" to the defense because the informer was a participant in or a witness to the crime charged. *Roviaro, supra*, 353 U.S. at 60; *Lopez-Hernandez v. United States*, 394 F.2d 820, 821 (9th Cir. 1968). In this case, however, there is no evidence that the informer in any way participated in the venture or witnessed any part of it.[3]

Under the circumstances of this case, we consider the public's interest in the protection of informers overrides the appellants' interest in identification. We do not think that knowledge of the informer's identity would have been of material benefit to appellants' defense. We hold that the district court did not err in refusing to disclose the identity of the informer.

(3) *Evidence of importation contrary to law*

Appellant Gibbs asserts that the government failed to introduce any evidence that the marihuana was imported or brought into the United States contrary to law, as required under 21 U.S.C. § 176a. We think that there was considerable circumstantial evidence from which the jury could find beyond a reasonable doubt that the marihuana was imported contrary to law. Evidence of importation included the following: Agent Holgerson testified that he believed that the informer's telephone call originated in Mexico; both vehicles displayed Mexican license plates; approximately one-half hour before Gibbs and Fernandez-Ortiz changed the license plates, Fernandez-Oritz drove the pickup back into Mexico; the vehicles were parked one-third block from the Mexican border, and Gibbs began to drive the marihuana-laden Buick northward. The clandestine switch of license plates and overall secretive conduct of both appellants was evidence that the operation was being conducted contrary to law.

The judgments are affirmed.

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[3]The factual circumstances of this case more closely approach those in *Encinas-Sierras v. United States*, 401 F.2d 228 (9th Cir. 1968); *Bloomer v. United States*, 409 F.2d 869, 871 (9th Cir. 1969), and *United States v. Camacho*, 423 F.2d 707 (9th Cir. 1970).

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

HAROLD DAVID GIBBS, JR.,

Appellant.

FILED
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WM.B.LUCK, CLERK

No. 25,271

O R D E R

Before: MADDEN*, Judge of the United States Court of Claims, HAMLEY and TRASK, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing.

The petition for rehearing is denied.

* Hon. J. Warren Madden, Senior Judge, United States Court of Claims, sitting by designation.